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Supreme Court of the United States

OCTOBER TERM, 1943.

Nos. 466, 467, 468.

DANIEL S. GILLMOR, HENRY H. ABRAMS and
PYRAMID COMMERCIAL CORPORATION, suing
on its own behalf and on behalf of all other owners
and holders of First Consolidated Mortgage 5% Gold
Bonds, etc.,

Petitioners,

—against—

THE INDIANAPOLIS GAS COMPANY and CITY OF
INDIANAPOLIS.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

FRANK E. KARELSEN, JR.,
DONALD L. SMITH,
WALTER MYERS, JR.,
PAUL E. KERN,

Counsel for Petitioners.



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Neither respondent attempts to justify the payment of \$39 per share to stockholders, while the bondholders are deprived of \$240 in accrued interest on each bond. The price paid by the City for the Gas Company properties was sufficient to pay the bondholders' claims in full, and in addition almost \$20 per share for stockholders, which figure approximated the market value of the stock (R. 165).

Yet the Gas Company arbitrarily determined to pay its stockholders \$39 per share, or nearly twice the market value thereof, by reducing the bondholders' claims for accrued interest by 60%.

Under a judicial reorganization, the payment made in these cases to the stockholders, at the expense of the bondholders, would undoubtedly have been declared unfair and discriminatory (*Case v. Los Angeles Lumber Products Co.*, 308 U. S. 106; *Consolidated Rock Products Co. v. DuBois*, 312 U. S. 510).

Equally indefensible, we submit, is the attempt herein to avoid the standards of fairness required under a judicial reorganization by the contention that the majority bondholders have voluntarily agreed to compel the minority to accept the reduced amount provided for them under the plan.

Neither respondent has in its brief (nor has the Circuit Court in its opinion) pointed to a single fact or authority which controverts or impugns the validity of the propositions set forth in the petition and our main brief that (1) the majority bondholders had no power under the mortgage to modify or destroy the rights of the minority on their bonds against the obligor, and (2) the Offer and Plan of Settlement was framed, presented and consummated as an offer by the Gas Company, binding only upon the bondholders who accepted the plan.

POINT I.

The decision by the Circuit Court, holding that the majority bondholders had unlimited control over the minority, is opposed to the law of Indiana, as well as to the law of every other jurisdiction, and is completely without any justifiable basis.

The respondents contend that the decision of the Circuit Court should not be reviewed on the ground that the question of the rights of the minority bondholders is to be determined by Indiana law. The fact of the matter is, however, that there is no Indiana decision on the subject. The fact is also that the decision of the Circuit Court is directly opposed to every decision in every jurisdiction which has ruled on this question.

There is not a single case in any jurisdiction which holds, as the Circuit Court did herein, that where a mort-

gage provides for control by the majority bondholders over the action of the trustee and the disposition of the mortgage security, the majority may exercise unlimited control over the minority and destroy the rights of the minority on their bonds against the obligor.

The cases cited by the respondents do not support any such proposition. Those cases merely hold that the specific powers granted in a mortgage or by statute to the majority bondholders to control the trustee or the mortgage security, will be enforced by the courts. They do not, however, authorize the grant by judicial construction of unlimited power to the majority over the minority.

Indeed, in the very cases cited by the respondents (*Florida v. National Bank of Jefferson*, 123 Fla. 525, and *Siebert v. Minneapolis*, 52 Minn. 148), the Courts specifically recognized the universal rule requiring strict construction of the powers granted to the majority bondholders over the minority.

In *Sage v. Central R. R. Co.*, 99 U. S. 334, which the Circuit Court described as analogous, this Court, in upholding the power of the majority bondholders to control the disposition of the mortgaged property, pointed out:

"The majority were empowered to direct the terms and conditions under which the new corporation should exist, and hold the property conveyed to it, as well as the limitations within which it might act. It is not intended that the majority could postpone the rights of any minority of the bondholders to those of other creditors, or allow any interference with those rights." (Emphasis ours.)

The decision of the Circuit Court herein is opposed not only to every judicial precedent, but also to every other justifiable standard. The provisions for majority control

over the trustee and over the mortgage security are made for the purpose of protecting the common interests of all the bondholders. No reason appears, however, why the majority should have the power to control the minority's rights on their bonds, aside from the mortgage security and aside from any matter affecting the common interests of the bondholders. Such power in the majority bondholders would undoubtedly open the way to abuse of the rights of minorities. It should not, we submit, be assumed that bondholders have voluntarily agreed to substitute the protection of the majority for the protection of the courts, in the absence of specific language in the mortgage to such effect.

We respectfully submit that the decision of the Circuit Court is untenable under the law of Indiana and under the law of every other jurisdiction. It constitutes a serious threat to the rights of numerous other bondholders whose rights are secured by mortgages which, as in the instant cases, provide for majority bondholder control over the action of the trustee and the mortgage security.

POINT II.

The Offer and Plan of Settlement constituted an offer by the Gas Company to the individual bondholders and was neither intended, framed nor adopted as a bondholders' agreement binding upon the non-assenters.

The respondents offer no explanation for the undisputed facts herein which clearly and definitely establish that the Offer and Plan of Settlement was framed, presented and adopted as an offer made by the Gas Company to the individual bondholders, binding only upon those who accepted the offer. No explanation is given

for the designation of the plan as an offer; for the fact that neither the plan nor the communications with respect thereto contained any statement that non-assenting bondholders would be bound; for the provisions of the plan which were clearly inconsistent with any purpose or effect of the plan to bind non-assenters; or for the deliberate concealment by the Gas Company of any purpose or effect of the plan to bind non-assenters.

Nor do the respondents attempt to justify the failure of the Circuit Court to pass upon these facts in determining whether or not the Offer and Plan of Settlement constituted an agreement by the majority bondholders to bind the non-assenting bondholders. Instead, the respondents assert that we are not entitled to raise this question on this petition for certiorari.

Certainly, however, it could not have been anticipated that the Circuit Court would deem of no legal significance the facts showing that regardless of any authority in the majority bondholders, the Offer and Plan of Settlement was not intended to bind the non-assenters. It could not have been anticipated that the Circuit Court would deem immaterial the manner in which the Gas Company prevented the bondholders from protecting their interests, by concealing the presently claimed purpose and effect of the plan to bind non-assenters.

The respondents assert that the failure of the petitioners to make any effort to prevent the consummation of the plan during the two months which elapsed between the announcement of the plan and its consummation, should be accorded weight in considering the petitioners' rights. This inaction by the petitioners, however, was due to the successful concealment by the Gas Company, in the plan and in its communications to the bondholders, of any intent or purpose to bind non-assenters. The minority bondholders were given no indication that their

rights would be destroyed by the consummation of the plan. The sale to the City was made subject to the mortgage and it reasonably followed that the value of the security to the non-assenters would be enhanced by the reduction of the bonded indebtedness, through the cancellation and surrender of the bonds whose holders were willing to accept the offer.

It should also be pointed out that the petitioners do not oppose and never have opposed the sale of the Gas Company plants to the City. There is no element of interference with the rights of the public in this case. The petitioners are concerned only with the intra-corporate question of the right of the Gas Company to divert the bondholders' share of the proceeds of the sale to the stockholders.

Conclusion.

The rulings by the Circuit Court in these cases that majority bondholders may exercise unlimited control over the minority, even in the absence of any provision in the mortgage which, explicitly or by implication, confers such right upon the majority, and further that the rights of the minority against the obligor may be destroyed by action of the majority, regardless of the intent or purpose of such action or the manner in which such action was procured, involve matters of vital public importance and warrant a review by this Court.

We respectfully pray, therefore, that the petition for writs of certiorari herein be granted.

Respectfully submitted,

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